

Testing the water

Integrating the right to water and sanitation into the development policies of the World Bank and EU member states

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Both ENDS has produced this briefing paper with the intention of making a useful contribution to the public debate about the recognition and implementation of the right to water and sanitation at both the national and international levels

EXECUTIVE SUMMARY

This briefing paper provides a brief overview of the current debate on the right to water and sanitation, outlining current challenges in the water and sanitation sector, defining basic concepts and outlining the benefits of using a rights-based approach to address water and sanitation. It also outlines the extent to which the right to water and sanitation have been recognised nationally and internationally, and shows just how rapidly changes are taking place in this field.

The paper focuses on the extent to which the rights-based approach to water and sanitation have been integrated into the policies of the European Union and its member states; and also considers the evolution of the rights-based approach within the World Bank's development policies.

On the basis of this discussion, the paper concludes that the right to water and sanitation can enhance the reduction of poverty through the water and sanitation sector. However, while recognition of the right to water and sanitation is growing rapidly, it has yet to be fully integrated into the development policies of EU member states, either in terms of bilateral policy or in terms of the contributions they make to the World Bank.

At the level of multilateral policy, some countries have also made headway in convincing the World Bank that it should integrate human rights approaches into its development policies. These initiatives still stand alone, however, and have yet to be mainstreamed into Bank policy. At the level of bilateral policies, EU member states are making headway in integrating the Right to Water and Sanitation (RTWS) into their development policies, but this process is far from completion.

In summary, the convergence in international law, some national legislation and the internal policies of the World Bank towards a human rights approach to water and sanitation provide a powerful argument in favour of other EU member states also integrating the right to water and sanitation within their development policies; and in favour of the World Bank to fully and formally recognising, defending and protecting the human right to water and sanitation.

INTRODUCTION

While access to safe water and sanitation may at first glance appear to be about providing 'taps and toilets', these services are unlikely to be delivered or maintained unless due attention is paid to the relevant institutional and legal contexts and related human rights concerns. Fortunately, the rights-based approach to development, which specifically includes the right to water, is increasingly accepted at the international level as an effective means of reducing poverty. The rights-based approach is a key mechanism to ensure that it is really the poor who benefit. This requires the development of law on the one hand and the strengthening of civil society on the other.

Marginalised groups, living in informal settlements for example, are often overlooked when it comes to the delivery of critical services such as safe drinking water. As competition for access to water increases over time, this situation could deteriorate even further. Mechanisms are urgently required to ensure that enough water is set aside to meet basic needs, foster hygiene and health, protect local ecosystems and produce food. A focus on the right to water and sanitation can play a vital role in achieving all these goals.

Progress in this field is already occurring rapidly, but major challenges remain. The protection of human rights is a key component of the EU's external relations, and many EU countries have already recognised the right to water. Yet this does not always extend to recognition of the right to basic sanitation, and the rights-based approach is not yet fully integrated into EU member states' development policies.

At the multilateral level, the World Bank is gradually moving towards a rights-based approach in its development policies, focusing more on 'good governance', 'transparency', the rule of law, and 'fragile states', for example. However, progress towards the full integration of a rights-based approach into World Bank policy is still constrained by internal debate about whether or not the Bank should be involved in the field of human rights at all.

This paper is divided into five sections. The first provides a brief overview of the debate, outlining current challenges in the water and sanitation sector, defining basic concepts and outlining the benefits of using a rights-based approach to address water and sanitation.

The second section outlines the extent to which the right to water and sanitation has been recognised nationally and internationally, and shows just how rapidly changes are taking place in this field.

In section three we focus on the extent to which the rights-based approach to water and sanitation has been integrated into the policies of the European Union and its member states.

Section four considers the evolution of the rights-based approach within the World Bank's development policies. Finally, section five draws some conclusions from the paper as a whole, and provides a series of recommendations for both EU member states and the World Bank. ■

1

BACKGROUND TO THE DEBATE

1.1

OVERVIEW OF CURRENT CHALLENGES IN THE WATER AND SANITATION SECTOR

Some 0.9 billion people currently lack access to safe drinking water, and around 2.5 billion lack access to basic sanitation.¹ Six years into the implementation of the Millennium Development Goals (MDGs), which are supposed to be met by 2015, such figures are dispiriting.² Although overall progress towards providing access to safe water has been reasonable, the statistics mask the fact that progress has mostly been made in middle-income countries. In other words, progress is still painfully slow at the lower end of the poverty spectrum. In the realm of sanitation, progress has been even slower, and at the midterm review of the MDGs in New York, in September 2008, it became evident that the sanitation objectives are most unlikely to be achieved.

A further complicating factor is that global demand for water is increasing at an alarming pace, as a result of both rising world population and the growth of the world economy. Water is needed to maintain life, environmental integrity and economic development, and this is resulting in increased competition for the resource at various levels.

Climate change is also altering rainfall patterns, meaning that traditional water supply systems may no longer be effective. Changing land use practices such as wetland drainage, deforestation and the clearing of vegetation for agriculture, together with urban growth, are also combining to undermine the stability of river basins. This has led to a rapid increase in flooding events, polluted watercourses and dwindling ground water sources.

Because of this, securing access to water and sanitation can no longer be considered separately from water resources management. This is recognised by the UN Committee on Economic, Social and Cultural Rights' General Comment No.15 on the right to water, which emphasises the protection of drinking water sources, implying a catchment wide approach.³

Some may argue that there is enough fresh water to meet all human needs, but the problem is actually lack of access to water in specific locations, rather than its general availability.⁴ In some cases, there is a lack of political will: providing adequate water and sanitation services is not a political priority at the national level and budget allocations are minimal. In other cases,

¹See for instance the Human Development Report (2006): Beyond scarcity: Power, poverty and the global water crisis, UNDP, available at: <http://hdr.undp.org/en/reports/global/hdr2006/>. According to this report, in 2006, 1.2 billion people worldwide did not have access to clean drinking water and about 2.6 billion lacked access to acceptable sanitation facilities. In the meantime, much progress has been made, especially in relation to access to water, but these successes are concentrated in middle-income countries. Targeting the poor, therefore, remains a crucial issue.

²United Nations (2001): Road map towards the implementation of the Millennium Development Goals, New York: UN, report A/56/326, pg. 20, mentions 1 billion without access to safe water and 2.4 billion without access to basic sanitation in 2001.

³See also WHO (2003): The Right to Water. Geneva: WHO health and human rights publications series no. 3, pg. 20.

⁴Filmer-Wilson, E. (2005), The human rights-based approach to development: the right to water, Netherlands Quarterly of Human Rights, Vol23/2, 2005, pp. 213-241, p. 229.

the political will may be present, but a lack of funds or capacity still prevents the development and maintenance of appropriate infrastructure.

Most interpretations of the 'right to water' accept that it cannot be implemented overnight and that it would be unfair to penalise States that simply cannot afford to comply immediately. It is thus sufficient for States to demonstrate that they have used the maximum available resources⁵ (bearing in mind that the 1993 World Conference on Human Rights also agreed that, "the lack of development may not be invoked to justify the abridgement of internationally recognised human rights."⁶) In other words, applying human rights principles to the supply of water and the delivery of sanitation should strike a balance between insisting on formal commitments from and implementation by States, and allowing them some leeway because of capacity constraints. ■

1.2

DEFINITION OF TERMS

Before embarking on an analysis of the right to water and sanitation, it is important to clarify the meaning of various terms.

When discussing the possible role of the World Bank in promoting the right to water and sanitation, for example, we are referring to a relatively small bandwidth within the broad spectrum of rights referred to in Annex 1. This paper uses the term 'right to water', to refer to access to water as a social good intended to meet basic needs. This in turn implies that access to water should be either free or affordable. It also has implications at community, national and international levels.

When discussing the right to sanitation, we also refer to the right to a 'basic' level of sanitation. Having said this, it must also be pointed out that even these 'end of pipe' rights cannot be satisfied adequately if upstream preconditions have not been met. In other words, domestic water use and sanitation are part and parcel of the broader water cycle and cannot be entirely separated from it. In a world of increasing water scarcity, these rights - access, economic, political and ecological - need to be managed in an integrated and holistic manner, if each is to exist without encroaching on the others. ■

1.3

BENEFITS OF THE RTWS

The Right to Water and Sanitation (RTWS) explicitly recognises that water is an essential social good, rather than a simple economic commodity. This differentiation is important, since competition is growing between different users of water resources, especially agriculture, industry and the domestic sector. By recognising the right to water, States and international bodies would be placing the satisfaction of basic needs over and above other uses.

Furthermore, recognition of the right to water and sanitation provides a strong framework for accountability. It serves as a platform for strong citizen engagement, underpins the need for access to information, establishes minimum requirements and generally lifts the political priority of the sector. It also provides support to delivery programmes by:

- Ensuring that access to water and sanitation become legal entitlements rather than services that may or may not be sold for economic gain or provided on the basis of charity;
- Allowing citizens to challenge political and institutional neglect;
- Establishing equal rights, which in turn allows identification of those who are 'least served'; and
- Ensuring accountability with clear roles and responsibilities
- Providing a platform for citizen engagement⁷.

In promoting the principles of equity, accountability, non-discrimination, broad-based participation and empowerment, the application of human rights principles protects the interests of the poor and the most vulnerable. It is therefore an essential building block in the pro-poor approach to water resource management. ■

2

NATIONAL AND INTERNATIONAL RECOGNITION OF THE RIGHT TO WATER AND SANITATION

2.1

INTRODUCTION

At the national level, more and more States are including the right to water and, increasingly, the right to sanitation in their domestic laws and policies. Since 2002, when General Comment No.15 on the right to water was adopted by the UN, more than twenty States have revised - or at least started to revise - their laws or constitutions, so that they explicitly include the right to water.⁸

Other countries, such as Uruguay and Kenya, guarantee the right to water and sanitation in their constitutions; and the constitutions of yet others, including Colombia, Ecuador, the Dominican Republic, Guatemala and Iran, include specific obligations with regard to sanitation and hygiene.

The domestic laws of South Africa, Madagascar, Honduras, Bolivia and Algeria all include individual rights to access to sanitation; and national sanitation policies in Bangladesh and Sri Lanka explicitly state that sanitation is a human right. The Supreme Courts of India and Bangladesh have held that both water and sanitation are part of the constitutional right to life.

At the international level, the right to water and sanitation has been endorsed through numerous political declarations, including the 1977 Mar del Plata Action Plan,⁹ the UN General

Assembly Resolution on the Right to Development in 2000,¹⁰ two declarations issued by the Non-Aligned Movement,¹¹ the Programme of Action of the 1994 Cairo Conference on Population and Development,¹² the 1996 Habitat Agenda,¹³ Recommendation 14 (2001) of the Committee of Ministers to Member States on the European Charter of Water Resources,¹⁴ and the recent "Message from Beppu" adopted by 37 States from the region at the 1st Asia-Pacific Water Summit in December 2007, which "recognizes the people's right to safe drinking water and basic sanitation as a basic human right".¹⁵

The right of everyone to minimum essential supplies of safe water for basic personal and domestic needs and basic sanitation is implicitly included in a variety of international human rights treaties. The central legal basis for the right to water and sanitation is the International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified by 157 States as of October 2007.¹⁶ In 2002, the Committee on Economic, Social and Cultural Rights (CESCR), the body of independent experts mandated to interpret the ICESCR and monitor implementation by States parties, adopted General Comment No. 15 on the right to water,¹⁷ in which the CESCR authoritatively interpreted article 11(1) ICESCR,

⁵United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 15, The right to water (2002), U.N. Doc. E/C.12/2002/11 (2003), par. 41.

⁶See Barlow, M (2007): Blue Covenant: The Global Water Crisis and the coming Battle for the Right to Water. New York: the New Press.

⁷These points are taken from a presentation by Oliver Cumming, Water Aid, to a session on the right to sanitation at the Dutch Ministry of Foreign Affairs in the Hague on 27/05/08.

⁸These include : the Democratic Republic of Congo (2006), Indonesia (2004), Mauritania (2005), Mozambique (2005), Namibia (2004), Nicaragua (2007), Uruguay (2004), Costa Rica (2004, draft), Honduras (2005, draft), Paraguay (2007), Peru (2005 environment law and 2007 draft water law), Venezuela (2007) and France (2006).

⁹Report of the United Nations Water Conference, Mar del Plata, 14-25 March 1977, U.N. Doc. E/Conf.70/29 (1977), at pp. 66-67..

¹⁰General Assembly Resolution 54/175 (2000), para . 12(a), which states the "rights to food and clean water are fundamental human rights, and their promotion constitutes a moral imperative both for national Governments and for the international community."

¹¹"The Heads of State or Government recalled what was agreed by the UN Committee on Economic, Social and Cultural Rights in November 2002, recognised the importance of water as a vital and finite natural resource, which has an economic, social and environmental function, and acknowledged the right to water for all" (14th Summit Conference of Heads of State or Government of the Non-Aligned Movement, Final Document, 16 September 2006, NAM 2006/doc.1/rev.3, para .226). See also the Final Document of the Ministerial Meeting of the Coordinating Bureau of the Non-Aligned Movement, Putrajaya, Malaysia, 27-30 May 2006, paras 184-187, where the Ministers of Foreign Affairs issued the exact same statement. The NAM has 118 member States.

(Note 12 - 17, see page 9)

which guarantees everyone the right to an adequate standard of living, as including the right to have access to minimum supplies of safe water.¹⁸

The right to water and sanitation has also been endorsed by the United Nations, through the Guidelines for the Realization of the Right to Drinking Water Supply and Sanitation, adopted by the UN Sub-Commission on the Promotion and Protection of Human Rights in 2006,¹⁹ and the 2007 Report of the UN High Commissioner for Human Rights, which deals with the scope and content of the human rights obligations related to access to safe drinking water and sanitation and concludes that “it is now time to consider access to safe drinking water and sanitation as a human right.”²⁰ Most recently, the UN Human Rights Council has created an Independent Expert on human rights and access to safe drinking water and sanitation.²¹ ■

2.2

FUNDAMENTAL HUMAN RIGHTS PRINCIPLES UNDERLYING THE RIGHT TO WATER AND SANITATION

The right to water and sanitation comprises the following aspects:

Sufficient water: Water supply for each person that is sufficient and continuous for personal and domestic uses, which normally include drinking, personal sanitation, the washing of clothes, food preparation, and personal and household hygiene.²² Ensuring the availability of sufficient water to meet the right to water and sanitation requires the prioritisation of essential domestic uses over other uses. In addition, the principle requires that attention be given to ensuring the sustained availability of water through

water resource management aimed at improving environmental, operational and financial sustainability.

Safe water: Water that is, in particular, free from hazardous substances that could endanger human health, and whose colour, odour and taste are acceptable to users.²³

Accessible water and sanitation: Water and sanitation services and facilities that are accessible within, or in the immediate vicinity, of each household, educational institution and workplace, and which are in a secure location and address the needs of different groups, in particular threats to the physical security of women and children collecting water.²⁴ According to the Sub-Commission Guidelines, sanitation must be safe, adequate and conducive to the protection of public health and the environment.²⁵

Affordable water and sanitation: Both the direct and indirect costs of securing water and sanitation should not reduce any person’s capacity to acquire other essential goods and services, including food, housing, health services and education.²⁶

As outlined in General Comment No.15 and the Sub-Commission Guidelines, the right to water and sanitation also incorporate requirements that apply to all human rights, such as non-discrimination and inclusion of vulnerable and marginalised groups,²⁷ access to information and participation²⁸ and accountability.²⁹

Non-discrimination and the inclusion of vulnerable and marginalised groups: The right to equality and the principle of non-discrimination are among the most fundamental elements of international human rights law. A crucial aspect of the human rights framework is that everybody is ensured access to water and sanitation, including the most vulnerable or marginalised groups, without discrimi-

nation. Non-discrimination implies that there is no distinction, exclusion, restriction or preference - based on any ground (e.g. race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status) - which has the intention or effect of impairing the equal exercise of the right.³⁰

Access to information and participation: The right to water and sanitation, in common with all human rights, is linked to the right to participate in decision-making. This principle requires that each policy, programme or strategy concerning water and sanitation is to include, as an integral element, the right of all people to participate in decision-making processes that may affect their rights.³¹ In addition special efforts are to be made by governments to ensure the equitable representation in decision-making of marginalised groups, in particular women. Communities have the right to determine what type of water and sanitation services they require and how to manage those services.³²

Accountability: The principle of improved accountability emphasizes obligations and requires that all duty-holders are accountable for their action or inaction. If implemented, persons or groups denied their right to water and sanitation gain access to effective judicial or other appropriate remedies that are transparent and accessible.³³ Immediate benefits include enhanced governance and greater participation of duty-holders and rights bearers.

The effect of implementing these principles is to empower individuals and communities and to strengthen their struggles for access to water and sanitation, as the case of the community living in the Phiri township in Soweto, South Africa shows (see Box 1). ■

BOX 1: WHAT THE RIGHT TO WATER MEANS IN PRACTICE: Township citizens in Soweto, South Africa, claim their right to water

South Africa was one of the first countries to recognise water as a fundamental human right in the Bill of Rights in its 1996 Constitution. This means that people in South Africa have the possibility of legal recourse if their right to water is violated.

The Phiri court case is an excellent example of what this means in practice for South Africa's historically marginalised groups. Residents of Phiri, a township in Soweto, Johannesburg, challenged the city of Johannesburg's forced installation of prepayment water meters in their area.³⁴ On 30 April 2008, the High Court of South Africa ruled this practice to be unconstitutional and discriminatory: while residents of wealthy historically white suburbs had the option to buy water on credit, those in low-income historically black townships had to pay for their water in advance. The city was directed to provide residents of Phiri with the option of a normal metered water supply.

The court also ordered the city to provide residents of Phiri with 50 litres of free water per person per day, overriding the city's decision to limit this to 25 litres per person per day or 6000 litres per household per month.³⁵ The judgement noted that the specific circumstances of Phiri's residents, many of whom suffer HIV-AIDS, justified a minimum amount that is higher than the national requirement.³⁶

Even though the national government of South Africa has a free basic water policy, the court's judgment is important because a significant proportion of low-income South Africans do not yet have access to free basic water. The court's decision thus puts pressure on municipalities to extend their supply of basic quantities of water for free. At the same time it helps to protect poor users against disconnection from water when they cannot afford to pay.³⁷ ■

¹² See Principle 2, which states, "Countries should ensure that all individuals are given the opportunity to make the most of their potential. They have the right to an adequate standard of living for themselves and their families, including adequate food, clothing, housing, water and sanitation." Available at: http://www.unfpa.org/icpd/icpd_poa.htm. For a list of participating countries, see the Report of the International Conference on Population and Development, A/CONF.171/13, 18 October 1994, available at: <http://www.un.org/popin/icpd/conference/offeng/poa.html>. The Cairo PoA was adopted by consensus by all 177 participating States.

¹³ Principle 11 of the Habitat Agenda states: "Everyone has the right to an adequate standard of living for themselves and their families, including adequate food, clothing, housing, water and sanitation, and to the continuous improvement of living conditions." The Habitat Agenda Goals and Principles, Commitments and the Global Plan of Action are , available at: <http://www.unhabitat.org/content.asp?ID=1176&catid=10&typeid=24&subMenuId=0>. The Habitat Agenda was adopted by consensus of all 171 UN member States represented at the conference. For a full list of participants, see UN Doc. A/CONF.165/L.4 (1996).

¹⁴ Council of Europe, Recommendation of the Committee of Ministers to Member States on the European Charter on Water Resources, Recommendation 14 (2001) para . 5. This decision was made by representatives of Foreign Ministers of the 43 states that are members of the Council of Europe.

¹⁵ The Message from Beppu, at: <http://www.apwf.org>. The full list of participating countries is available on the same site.

¹⁶ For an overview of the human right to water and sanitation and discussion on the ICESCR and other international and regional instruments that include the right to water and sanitation, see COHRE, *Manual on the Right to Water and Sanitation*, 2008, available for free download at: <http://www.cohre.org/manualrtws>. Concerning the legal basis, see in particular COHRE, *The Human Right to Water and Sanitation: Legal basis, practical rationale and definition*, 2008. Available at: <http://www.cohre.org/resources>.

¹⁷ General Comment No. 15 is not legally binding per se, but it constitutes an authoritative interpretation of provisions of the ICESCR by the competent body. General Comment No. 15 has received wide acceptance by States parties.

¹⁸ Article 11(1) ICESCR can be understood to also encompass sanitation. See COHRE, *Sanitation: A Human Rights Imperative*, 2008, available at <http://www.cohre.org/sanitation>, for a detailed discussion of the legal basis, scope and content of the right to sanitation.

¹⁹ Available at: <http://www2.ohchr.org/english/issues/water/index.htm>.

²⁰ At: <http://www2.ohchr.org/english/issues/water/index.htm>. In At para 66. Emphasis added. The OHCHR report was based on an explicit mandate of the Human Rights Council in a decision taken without a vote to carry out: "a detailed study on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments." See UN Doc. A/HRC/2/L.3/Rev.3.

²¹ See UN Doc. A/HRC/7/L.16.

²² General Comment No. 15, para. 12(a).

²³ General Comment No. 15, para . 12(b), referring to the respective WHO Guidelines.

²⁴ General Comment No. 15, paras . 12(c)(i), 29, Sub-Commission Guidelines s. 1.3(a)-(c).

²⁵ Sub-Commission Guidelines, s. 1.2.

²⁶ General Comment No. 15, para 12(c)(ii); Sub-Commission Guidelines, s. 1.3(d).

²⁷ ICESCR, Art. 2 (2), General Comment No. 15, paras. 12 (c)(iii), (13), (16); Sub-Commission Guidelines, s. 3.

²⁸ General Comment No. 15, para. 12 (4), 48 and 55; Sub-Commission Guidelines, s. 8.1.-8.3.

²⁹ General Comment No. 15, para. 55; Sub-Commission Guidelines, s. 9.

³⁰ ICESCR, Art. 2 (2): General Comment No. 15. Paragraphs 12 (c)(iii), (13), (16); Sub-Commission Guidelines, s. 3.

³¹ General Comment No. 15, para. 48; Sub-Commission Guidelines, s. 8.1.

³² Sub-Commission Guidelines, s. 8.2.

³³ General Comment No. 15, para. 55; Sub-Commission Guidelines, s. 9.

³⁴ www.cohre.org/watersa, Right to Water - South Africa, Johannesburg, 1 May 2008.

(Note 35 - 37, see page 11)

3

THE RIGHT TO WATER IN EU DEVELOPMENT POLICY

3.1

INTRODUCTION

The gradual evolution of an international human rights regime is part and parcel of what has been termed 'normative globalisation', or the increasing acceptance of international norms on good governance, democracy and human rights as sources of legitimacy.³⁸ The push for internationally accepted normative 'standards' on human rights and good governance through multilateral institutions is a response to a period in history when the nation state is no longer the be all and end all of economic and political life. Globalisation has interlinked the economic, political and cultural lives of citizens across the world, creating new points of reference for all involved. Economic activity, political engagement and cultural identification are all becoming increasingly trans – national in nature. In this process, state sovereignty is diluted and made subject to international standards on human rights and democracy as defined by multilateral institutions such as the United Nations.

In the field of water supply and sanitation, the development of a rights-based approach has emerged as an antidote to voluntarism. Normatively, the access to safe water for instance is explicitly made independent of political discretion or the will to implement delivery programmes. According to the rights-based approach such fundamental human needs as drinking water

should neither be subject to charity, nor to the impulse to sell services for a profit. They belong to a category of basic rights that are expressly placed outside the realm of political discretion, market forces or charity. In this section, we analyse how and to what extent the right to water and sanitation has found its way into EU policy and the development policy of a number of member states. ■

3.2

THE EUROPEAN UNION AND HUMAN RIGHTS

For the European Union, human rights and democracy are central aspects of its external relations, stemming from a joint commitment to the respect for human rights and democracy within the European Union itself. In the realm of the EU's development policy, therefore, democracy and human rights are an externalisation of commonly held normative frameworks within the Union. These normative frameworks are laid down in a series of treaties and common policy documents that serve to anchor external relations to these common values. Thus Article 6 of the

Treaty on the European Union, for instance, states that:

"The Union is founded on the principle of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles which are common to the member states."³⁹

More specifically, Article 177 (2) of the EC Treaty provides that Community development policy,

"shall contribute to the objective of developing and consolidating democracy, the rule of law and human rights."⁴⁰

It is important to note at this point, however, that democracy, the rule of law and human rights are not the *only* principles on which the European Union is founded. The expansion of a common market, for instance, has arguably been more influential.

For example the 'merchant' of trade policy is clearly stronger than the 'vicar' of human rights policy when it comes to foreign trade relations. There are strong financial incentives, for instance, to enter into economic relations with countries that do not respect human rights, democratic principles, or the rule of law. The forging of strong economic relations with China,

with its poor human rights record, is a case in point. Similarly, EU insistence that southern African countries should enter into Bilateral Investment Treaties has taken the world's oldest customs union, the Southern African Customs Union, to the point of collapse.

This leads on to a second key that while human rights are legally paramount, gaps between policy and implementation may still emerge. These are only likely to be closed through concerted citizen engagement. This, of course, is fundamental to the working of democracy: rights do not exist in a vacuum but can only be translated into entitlements through ongoing civic engagement. By consequence, rights-based approaches cannot be restricted to formulation and promulgation: *there needs to be equal attention to the strengthening of the voice of civil society in order to realise these rights in practice.*

The EU's approach to human rights is based on a range of key UN instruments including:

- The Universal Declaration of Human Rights;
- The International Covenant on Economic, Social and Cultural Rights; and
- The International Covenant on Civil and Political Rights.

In its external relations the EU is formally committed to encouraging other countries to sign, ratify and implement these pillars of international law. Because access to water has now been recognised as a human right by the International Committee on Economic Social and Cultural Rights, this commitment applies by extension to the right to water.⁴¹

The EU has a number of instruments at its disposal for implementing its human rights policy, including political dialogue (with China and Iran on human rights, for example) and fund-

ing instruments, such as the European Instrument for Human Rights and Democracy. However, few instruments are legally binding and this rather undermines the rights-based approach.

Importantly, though, this is not true for international treaties. Thus it is significant that all draft directives relating to bilateral treaties between EU and non-EU countries contain a preamble referring to human rights. Violations of human rights allow the EU to terminate such agreements.⁴² This is potentially of great importance, as the preamble of all external treaties contextualises the agreements in, and predicates them upon, the promotion and protection of human rights. For example, the promotion of human rights and democracy has been integrated into the Cotonou Agreement between the EU and ACP countries, which still provides the framework for economic relations between these countries.⁴³

While the EU treaties provide legal footing for rights-based approaches in the external relations of the Union, they do not necessarily light the way in terms of approaches to poverty alleviation. The complementarities and coherence in EU development cooperation is anchored in the European Consensus for Development. This is a joint statement by the European Council, Parliament and Commission issued in December 2005 and provides a common vision guiding the development interventions of the EU. A key issue within the Consensus on Development is the commitment to ensure policy coherence, aiming to increase aid effectiveness by overcoming fragmentation and lack of focus. Furthermore, the Consensus provides a point of entry for the mainstreaming of development policy into other areas of policy, i.e.

“Ensuring the EU shall take account of the objectives of development cooperation in all policies that it im-

³⁵ http://www.downtoearth.org.in/full6.asp?foldername=20080615&filename=news&sec_id=4&sid=7

³⁶ www.cohre.org/watersa, Summary and analysis of the Mazibuko judgment, Conteh, S., Khalfan, A., COHRE, 2008. p.3.

³⁷ www.cohre.org/watersa, Summary and analysis of the Mazibuko judgment, Conteh, S., Khalfan, A., COHRE, 2008. p.4.

³⁸ Balducci, G (2008): The study of the EU promotion of human rights: the importance of international and internal factors. University of Warwick/College of Europe working paper no. 61 / 08

³⁹ European Commission for External Relations (2007): Furthering Human Rights and Democracy across the globe. Luxembourg: Office for Official Publications of the European Union.

⁴⁰ Ibid.

⁴¹ In 2002, the Committee on Economic, Social and Cultural Rights (ICESCR) issued a general comment (no. 15) confirming that the right to water is a fundamental aspect of the concept of an adequate standard of living as contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR).

⁴² Der-Chin Hong (2003): The Human Rights Clause in The European Union's External Trade and Development Agreements. In; *European Law Journal* 9.5, 677-701;

⁴³ Crawford, G.: Evaluating EU promotion of human rights, democracy and good governance: towards a participatory approach. University of Leeds.

plements which are likely to affect Developing Countries, and that these policies support development objectives."⁴⁴

However, there is an important paradox here. On the one hand, the Consensus on Development features human rights and water as two of the nine priority areas for intervention. On the other hand, water and sanitation are not fully integrated into human rights policy, nor are human rights fully integrated into the water supply and sanitation policy. A minimum standard for 'coherence' would seem to be the idea that the nine priority areas for intervention are mutually supportive in practice. There seems to be an emerging need to develop integrated policies that simultaneously address water and sanitation, the promotion of human rights and the rule of law, and environmental sustainability (given concerns relating to climate change, increasing water scarcity and the destabilisation of the water cycle through land use changes).

The EU is the world's largest water aid donor, collectively contributing some US\$1.4 billion annually to the sector. Given the importance of rights-based approaches, it would appear to be obvious that EU member states' development policies relating to water supply and sanitation should also pay explicit attention to such flanking rights-based approaches. In practice, however, member states differ on this point.

In addition, a range of core EU development policies fail to reflect appropriate international human rights frameworks in a coherent and consistent manner, despite a growing demand for rights-based approaches.⁴⁵ ■

3.3

EU MEMBER STATES AND THE RIGHT TO WATER AND SANITATION

Sweden

From the point of view of further embedding human rights into EU policy, it is important to note that Sweden takes up the Presidency of the European Union in 2009. Sweden has elevated human rights to the level of a key organising principle in its own foreign policy and therefore in its development policy. As of March 2008, work had commenced on mainstreaming the promotion of human rights into all aspects of Swedish foreign policy, including trade policy, development cooperation, and environmental policy.

Important areas that could *flank* and support a rights-based approach to water supply and sanitation delivery are commitments to strengthening democracy and freedom of expression, combating discrimination, and protecting human rights and the rule of law (including international law). Importantly, these involve strengthening the voice of civil society groups in respect of claims for economic, social and cultural rights, in addition to focusing on disadvantaged groups such as women.

Sweden prefers to implement the right to water through development cooperation rather than the furtherance of 'legal complaints mechanisms'.

The United Kingdom

The United Kingdom formally recognised the right to water in November 2006, when the then Secretary of State for International Development called for a Global Action Plan to deal with the global water crisis. This call was reiterated during the Millennium Development Goals summit in New York in 2008, when the Netherlands and the United Kingdom issued a joint call for a Global Action Plan and proposed an

annual high-level meeting to assess and report on progress towards the achievement of the MDGs with respect to water supply and sanitation.

In terms of implementation, the UK also made a commitment to increase its spending on water supply and sanitation significantly, doubling its contribution to the sector in 2008 (to £95 million), and doubling it again in 2010 (to £200 million).⁴⁶ Although UK development policy does not formally spell out actions recipient countries should take with respect to rights-based approaches, recognising the right to water does have implications in the field of policy implementation. One key aspect of this is the stated intention of focusing on the poorest, which is backed by the right to water's focus on non-discrimination.

The UK has also called on all donors to provide longer-term predictable funding through public budgets to cover investments in the water sector and to assist the poor with operational and maintenance costs. This policy position is related to the right to water in that it calls for an end to 'voluntary' or 'charity-driven' assistance. In other words, if access to safe drinking water and sanitation is a human right it should not be subject to charity or even the ability to pay. Instead, it should be an inalienable entitlement. This can only be ensured through the kinds of long-term funding commitments that the UK is calling for.

In a letter on the right to water sent to the United Nations Commissioner for Human Rights by the UK permanent mission to the United Nations and other international organisations, the UK Government declared that:

"DFID sees human rights as central to the development agenda and the fight against poverty. We are committed to working with developing country governments to assist them in implementing their human rights

obligations and to empowering people living in poverty to claim their rights.”⁴⁷

This approach brings together the two sides of the rights ‘coin’ - that is, furthering rights on the one hand and strengthening the capacity to claim those rights on the other. The following potential programme activities were included in the letter:

- Providing support to partner governments to fulfil their ICESCR obligations;
- Raising the issue of the right to water in dialogues on national poverty alleviation strategies;
- Strengthening political and policy support for the needs of the poorest;
- Supporting increased transparency and accountability;
- Building the capacity of those with duties to fulfil the right;
- Working on measures to tackle exclusion and discrimination of particular groups;
- Providing assistance to strengthen the legal and policy framework on the right to water;
- Supporting public expenditure reviews to ensure that water provision is targeting the poor;
- Providing support for national monitoring systems;
- Supporting measures to raise awareness;
- Supporting measures to increase poor people’s voice and participation in processes involving rights; and
- Strengthening the capacity of poorer groups to claim their rights.

Germany

Germany has also absorbed the right to water into its development policy, stating that:

“Having a source of drinking water within reasonable reach is as much part of realising human rights as being able to enjoy the highest attainable

standard of health or universal and equal suffrage.”.

According to the German foreign ministry, a development policy that is based on human rights is currently gaining ground internationally, and Germany has been following suit since 2004, when it released a development policy action plan on human rights for the period 2004-2007. This has currently been followed by a second such policy covering the period from 2008 to 2010. In this document, the Federal government of Germany pledges a commitment to the furtherance of economic, social and cultural rights. With specific reference to water, this is taken as meaning that access to water must be non-discriminatory.⁴⁸ It means that access to water cannot be denied even under conditions of scarcity, i.e., that this category of demand should enjoy priority of access in water. Similarly, it implies that affordability should no longer be an issue, i.e. that there is an obligation to provide people living in extreme poverty with the minimum amount of water necessary for life at no charge if need be.

Specific proposals from Germany include:

- Supporting the establishment of appropriate mechanisms for participatory conflict resolution to enhance equitable access to safe drinking water, basic sanitation and agricultural production; and
- Ensuring that dam building is compatible with human rights.

Beyond this, however, the right to water supply and sanitation has not been translated into operational strategies within German development cooperation.

The Netherlands

In March 2008, the Dutch Government announced its intention to recognise the right to water.⁴⁹ According to the Netherlands’ Ministry of Foreign Af-

⁴⁴Council of the European Union (2005): European Consensus on Development. Brussels: 14820/05 DevGen 229 Relex 678 ACP 155.

⁴⁵See Twomey, *P et al* (2008): Human Rights-Based Approaches and European Union Development Aid Policies. Ireland: Amnesty International, Terre des Hommes, Action Aid and International Human Rights Network, p39.

⁴⁶DFID (2006): Why we need a global action plan on water and sanitation. London/Glasgow: DFID.

⁴⁷Letter on the right to water of the U.K. permanent mission to the United Nations and other international organisations, sent to the United Nations Commissioner for Human Rights, OHCHR registry, 7th June 2007.

⁴⁸Federal Ministry for Economic Cooperation and Development (2006): Water Sector Strategy. Bonn: Federal Ministry for Economic Cooperation and Development, strategy paper no. 152

⁴⁹Speech by Minister for Foreign Affairs Maxime Verhagen to the Human Rights Council, 03/03/2008.

fairs, recognition of the right to safe water and basic sanitation is important for the poor because it supports their moral right to place pressure on their government and on the international community to assist in the provision of these services.

Furthermore, the Dutch government sees the emphasis on the right to water and sanitation as a means of raising the political priority of these issues, saying:

“There are few countries where water is a political priority. While many countries have made plans for poverty reduction, clean drinking water and sanitation often occupy an inferior position within these plans.”⁵⁰

The Dutch government also emphasises the political element of recognising the right to water. According to the Dutch Minister for Development Cooperation, there is a need to politicise development aid in general in the interests of the poor.⁵¹ The Dutch government also stresses that its recognition of the right to water provides NGOs with a powerful tool for international lobbying. To the Dutch, then, the recognition of the right to water is seen primarily as a political tool. Although the right to water is already part and parcel of other international treaties that the Netherlands has the opportunity to emphasise the need to respect, protect and fulfil the right to water signed, its explicit recognition outside these treaties provides the Netherlands with countries with which it has a development relationship. The Dutch Government will engage in two such dialogues on a pilot basis, with Benin and Indonesia, in 2009.

The Dutch Government would also like to see the right to water integrated into the investment programmes of the World Bank and regional development banks. To this end, it supported Both ENDS, COHRE and the Freshwater Action Network in their effort to

hold a debate on the right to water at the World Bank, in Washington in October 2008.

In conclusion, a number of EU countries have made a significant contribution towards the acceptance of the right to water internationally, by recognising that right (to varying degrees) within their own development cooperation policies and practices and in their dialogue with and about the investment policies of the World Bank and regional development banks. ■

4

THE WORLD BANK AND THE RIGHT TO WATER AND SANITATION

4.1

INTRODUCTION

How, if at all, does the right to water and sanitation (RTWS) link into the policies of the World Bank? How can a banking institution engage with national laws detailing these rights? This chapter seeks to address these questions by illustrating the linkages between a selection of the Bank's policies and the emerging global trend towards the recognition of the right to water and sanitation (RTWS). In short, we argue that the application of the RTWS by the World Bank would strengthen its pro-poor focus.

However, there is a wide spectrum of possible scenarios for this application, ranging from the provision of assistance to national governments in their application of RTWS through to the formal endorsement of RTWS by the Bank itself. This chapter will outline some of these possibilities, explaining their links to existing international law, current World Bank policy, and international development trends. ■

4.2

ROLE OF THE WORLD BANK

As an anchor of the post-war international order, the World Bank is fundamental to the architecture of an increasingly globalised world. Against the background of rapidly increasing pressures on the global natural environment, the development of a legal framework that lays down the ground rules for action on a 'crowded planet' is an urgent necessity. Social, economic, political and cultural rights are fundamental to the functioning of the international economic order in the 21st century; and institutions and policies ensuring sustainable and non-discriminatory access to natural resources necessary.

As an institution committed to the reduction of poverty, sustainability, and the stimulation of economic growth these issues are obviously of direct concern to the World Bank. It follows that the development of a policy framework outlining the basis of sustainable interactions between people, planet and profit is also necessary. Since water is at the core of both economic and ecological activity, its absence is a significant driver of poverty. The fair allocation of water to different users is therefore fundamental to global and local economies, sustainability, and poverty alleviation. ■

4.3

THE WORLD BANK AND ITS EXPANDING DEVELOPMENT AGENDA

Does the existing international recognition of the right to water, as embodied in a wide range of conventions, also have direct implications for the World Bank's policies? If we were to take the Bank's Articles of Agreement and apply these in a strict sense, the answer would be 'no', as these Articles only require the Bank to take "economic considerations" into account⁵² in its lending policies.

However, this mandate is immediately called into question since the Articles of Agreement themselves are the outcome of treaties agreed by the States that met at Bretton Woods in 1944. As a result, the Bank is both the product of international law and bound to its mandate within the framework of this international law.

For many decades, the Bank saw its role as an institution driven solely by economic considerations. According to Wright, for instance,

"until 1989, the International Finance Corporation (IFC)⁵³ regarded its policy to only lend to projects with a 'satisfactory ex-ante economic rate of return' to be its most fundamental development contribution, and considered the financial profitability of the projects it supported as the '*sine qua non*' of their development impact."⁵⁴

However, as time has passed, the Bank's role has changed and so of course has the world in which it finds itself. It has assumed an ever-broader set of social and environmental responsibilities related to the expanding agenda of 'development'. As a result, the Bank is only one small step short of the full recognition of those duties emanating from international law.

⁵⁰ Ministry of Foreign Affairs (2008): Brochure *Recht op Water*. The Hague: DGIS, 2008. Translated from Dutch.

⁵¹ Ministry of Foreign Affairs (2007): *Een Zaak Van Iedereen*. The Hague: DGIS. White paper on development cooperation released by the Minister for Development Cooperation in October 2007.

⁵² World Bank (1998): *Development and Human Rights: The Role of the World Bank*, World Bank, p.3.

⁵³ The IFC is the private sector arm of the World Bank, and has a goal of fostering sustainable economic growth in developing countries by financing private sector investment, mobilising capital in the international financial markets, and providing advisory services to businesses and governments.

⁵⁴ Christopher Wright in Stone and Wright (2007): *The World Bank and Governance: a decade of reform and reaction*. London: Routledge, p70.

Skogly formulates this change as follows:

“a significant body of literature points to the positive and negative impact on human rights of the policies and programs of the IFIs, and the institutions themselves have moved towards an acceptance that a human rights conducive policy may be a positive way of fulfilling their mandates, even if no specific acceptance of obligations in this sphere has been explicitly voiced.”⁵⁵

Historically, the role of the World Bank as an international ‘private’ bank remained in place until 1989, after which the exclusive focus on economic objectives began to be replaced by a broader policy that included the pursuit of social and environmental objectives. According to Wright, for instance, “until 1989, the IFC regarded its policy to only lend to projects with a ‘satisfactory ex-ante economic rate of return’ to be its most fundamental development contribution, and considered the financial profitability of the projects it supported as the ‘sine qua non’ of their development impact”⁵⁶

During the 1990s, the Bank’s internal commitment to the pursuit of social and environmental policies grew, both within the Bank in general and the IFC specifically. Furthermore, by the end of the century, international competition in financial markets had increased to the point at which the development of an identity that accentuated social and environmental policies had become a means to profile the bank and distinguish it from other lending institutions in the international financial arena.

Under the leadership of Glen Armstrong, the Bank and the IFC conceived and formalised the Bank’s Environmental and Social Safeguard Policies in 1997. The main aim of these policies was to broaden the

social and environmental elements in project analysis, especially with regard to lending for large-scale infrastructure projects.

Because of these safeguard policies, the IFC was considered capable of acting as a public development institution that could extend its influence beyond the narrow boundaries of individual projects. It could now deliver benefits to millions of poor people, and respond to civil society’s critiques of the environmental consequences of its projects. It thus shifted from focusing exclusively on the private arena to functioning as a public development institution.

The Bank’s review policies enabled the expression of diverse opinions about the pros and cons of infrastructure projects and this served to deepen democratic practices within the Bank. They also helped to establish a regulatory framework based around social and environmental issues. In other words, there was at least a tacit recognition of the importance of the rule of law in relation to major infrastructure works, including water supply projects, as a means of advancing poverty alleviation. In fact the World Bank has long recognised, at least implicitly through its policies and operations, the links between law and development, even if this recognition has not yet been formalised. This is already reflected in its policies in many sectors, especially its good governance projects. ■

4.4

CURRENT STRATEGIC DIRECTIONS OF THE BANK

In October 2007, the Bank’s new president Robert Zoellick reflected that, sixty years after its establishment, the organisation needed to adapt to “vastly different circumstances in an era of globalization.”⁵⁷

Two key words that encapsulate the World Bank’s current response to globalization are **“inclusiveness”** and **“sustainability”**. Both of these policy directions have powerful implications for the way in which water and sanitation delivery and maintenance are approached.

Inclusiveness points to the need to adopt a non-discriminatory approach, with all providers seeking to extend their reach to all rather than simply cherry picking ‘low hanging fruit.’ in the drive to achieve the Millennium Development Goals It implies a focus on those excluded, and a recognition of and emphasis on the negative side effects of globalization. There are strong parallels between this and the application of human rights principles and standards, which seeks to underscore non-discrimination or inclusiveness as a key principle of delivery to which those who are responsible for delivering services can be held on the basis of a social contract.

The World Bank’s approach to sustainability is based on the belief, as expressed by Zoellick, that, “poverty breeds [...] devastation of common resources and the environment.”⁵⁸ Thus providing security of access to water and sanitation for those left out of the globalization process is seen not only as an end in itself, but necessary for the protection of our planet.

Zoellick identified six strategic themes for the organisation, which were approved by the board. The first is the continuation of the pro-poor focus of the Bank, with specific reference to achieving Millennium Development Goals in the poorest countries. This has important implications with respect to human rights principles. First of all, it reaffirms the fact that the achievement of MDG 7 (ensuring environmental sustainability) is a pillar of World Bank policy and, in its slipstream, acknowledges MDG target 7C. By inference, any policies that enhance the ability of delivery agents to achieve their targets (inclusively and sustainably) serve to achieve the goals of the Bank in this regard. To the extent that providing support for rights-based approaches to water and sanitation enable citizens to hold governments to their targets in the progressive realization of these rights, they are an important instrument in the achievement of the MDGs.

The second strategic theme for the World Bank is the theme of fragile States. The adoption of a separate policy on fragile States underscores the helplessness and vulnerability of millions of poor people living in countries ravaged by war. Amongst the poor, they belong to a separate class in that their vulnerability is not just economic in nature but also characterised by the absence of the rule of law and the application of basic civil and political rights.

This focus on fragile States is also a powerful statement underscoring the importance of functional legal systems, expanding the arena of law and development in which the World Bank has already developed a track record. It also enhances the notion of good governance within the Bank.

Of the remaining strategic themes for the bank, an absolutely crucial theme from the point of view of a rights-based perspective is theme four, i.e.

the “need to play a more active role in fostering of regional and global public goods that transcend national boundaries”⁵⁹ Indeed, an analysis of World Bank support from the perspective of environmental sustainability carried out by the Independent Evaluation Group (IEG) has stated that although the Bank is familiar with work in the environmental realm, “far greater progress is needed in giving these concerns operational priority”⁶⁰

Importantly, the World Bank has emphasised the need to work more closely with the United Nations, the World Health Organization and the World Trade Organization on fostering public goods, with explicit reference to both communicable diseases and climate change. This brings the Bank into the territory of other intergovernmental organisations such as the United Nations Framework Convention on Climate Change. Specifically, it is moving towards the management of climate funds released by governments as a result of UNFCCC agreements. It is therefore positioning itself as an implementing agent for a key pillar of international law. World Bank proposals for the new Strategic Climate and Clean Technology Funds state that these funds should be guided by the United Nations Framework Convention on Climate Change (UNFCCC).⁶¹

⁵⁵ Sigrun Skogly in Andreassen and Marks (2006): *Development and a Human Right. Legal, Political and Economic Dimensions*. Cambridge, Massachusetts: Harvard University Press, pg284.

⁵⁶ Christopher Wright in Stone and Wright (2007): *The World Bank and Governance: a decade of reform and reaction*. London: Routledge, pg. 70.

⁵⁷ Robert B. Zoellick (2007): *Catalysing the Future: An Inclusive and Sustainable Globalisation*. Speech delivered to the Annual meeting of the Board of Governors of the World Bank Group. Washington: World Bank, October 2007.

⁵⁸ Ibid.

⁵⁹ Robert B. Zoellick (2007): *Op Cit*.

⁶⁰ Independent Evaluation Group (2008): *Environmental Sustainability. An evaluation of World Bank group support*. Washington: The World Bank.

⁶¹ Celine Tan (2008): *World Bank's Climate Funds Proposal Distorts UNFCCC Principles*. Penang: Third World Network. This is not to say that the World Bank's climate funds are acting in accordance with the UNFCCC, in fact they are not, despite being held to it under international law.

BOX 2: WHY THE RIGHT TO WATER REALLY MAKES A DIFFERENCE

Hameda Deedat

Many community and social activists already understand water as a 'human right', since water brings life and has no substitute. The World Bank, however, considers water from an economic point of view: it has been a fervent promoter of the privatisation of water services, even though this has had many negative impacts for communities. It is thus encouraging to see that the World Bank has reviewed its position on water privatisation. However, if the Bank is truly committed to supporting the Millennium Development Goals, it needs to take a further critical step: it should recognize that water has a value that goes far beyond economics, that water is paramount.

The Bank may question whether water really needs to be accepted as a right in order to achieve the Millennium Development Goals. It may argue that improvement in access to water would suffice. But events in South Africa indicate that the opposite is true.

South Africa was one of the first countries to enshrine water as a right in law (although many other countries now do so as well). South Africa is also one of the few countries to have achieved its Millennium Development Goals. However, it is still possible to find poor communities struggling to access 'basic' water and sanitation services. Yet, since the right to water and sanitation is now recognized in South African law, it has been possible to challenge this situation, bringing court cases against private companies and the state.

While the prospect of civil society and grass root movements taking governments to court might sound alarming, the long-term implications are significant. By having the ability to insist on the implementation of their right to water and sanitation, the lives of communities, and the poor in particular, can be improved dramatically. This right brings improvements in health and hygiene, and this in turn reduces expenditure on health. It also means that families in both rural and urban areas can use water for important economic activities, including growing food and developing small businesses.

Surely these are precisely the type of outcomes that will contribute to the Millennium Development Goals? The World Bank should play a role in encouraging and supporting other countries to follow suit. In this way the Bank could have a profound impact on the lives of ordinary people and the poor throughout the world.

This right to water and sanitation does not mean that water will be accessed and used without constraint. Rather, the right to access water brings with it the responsibility to use water sustainably, to conserve it, and to comply with relevant legislation and regulations. Granting water rights is not like handing over a blank cheque. It is better than that: it gives people the right to participate and engage as responsible citizens.

Water is life, and sanitation is dignity. There are no substitutes, just consequences. Supporting the right to water and sanitation is simply good business sense. ■

Summary of a presentation to Both ENDS Political Café "Testing the water: How can applying the human right to water and sanitation enhance the World Bank's policy and practice?" 9 October 2008, Washington D.C.

Hameda Deedat is a gender, trade and water activist working with Umzabalazo We Jubilee, South Africa

4.5

THE WORLD BANK AND HUMAN RIGHTS

For many decades, the World Bank failed to pay sufficient attention to human rights principles. However, according to the Bank's website "there has been growing recognition of the need for the Bank to address human rights in a more explicit fashion."⁶²

A turning point came in 1998 when the Bank declared that "[...] through its activities and its renewed commitment to human rights, (the Bank) will play a key role in the promotion of human rights and in the building and strengthening of national human rights capacities in the countries in which it operates."⁶³ This commitment was based on its deeper mandate as an organisation committed to reducing poverty, as well as to a growing recognition that development and human rights are strongly interrelated. To have an impact on development, then, one must also implement policies that strengthen human rights.⁶⁴

In moving in this direction, the World Bank has evolved from being an institution with a technocratic approach to development, to one that fully recognises the role of governance as a key contributor to development:

"For the first few decades of its history the Bank addressed development primarily as a technocratic challenge. The implicit model was that good advisers and technical experts would design good policies and good projects, which good governments with adequate resources would then implement for the benefit of society. The Bank has learned, however, that at least as important as the policies and the resources for development are the efficiency and transparency of the institutions that carry out the

policies [...] the World Bank helps its client countries built better governance. This assistance in improving the efficiency and integrity of public sector institutions [...] has a singularly important, although indirect, impact upon creating the structural environment in which citizens can pursue and continue to strengthen all areas of human rights.”.

This first step forward was a cautious one. For example, Ana Palacio (Senior Vice President and General Counsel of the World Bank Group) cautioned that while creating conditions for the development of human rights in client countries was firmly within the Bank’s mandate, this did not mean that the Bank recognised a role for itself as a promoter of international obligations.⁶⁵

By 2006, the Bank had reflected further on this issue. A legal opinion on human rights and the work of the World Bank stated that:

“As the concept of development has evolved, human rights and international human rights law have become increasingly relevant to helping the bank achieve its mission and fulfil its purposes by supporting better development practices and more sustainable, equitable outcomes. Human rights offer a standard by which to assess progress and the efforts of those with obligations to achieve development targets and the Millennium Development Goals.”⁶⁶

While it is quite possible that the Bank will continue to reject any obligation to promote international legal obligations for some time to come, it is important to note that this major policy shift within the bank has come about because of a changing conception of development itself.

The Bank’s current mission is the alleviation of poverty through economic growth and social equity. The broad-

ening of the concept of development into areas of human development, including social development, education, governance and institutions, has enabled the Bank to embrace rights as a component of development, even though these may not lie within the stricter interpretations of its mandate as conceived more than six decades ago.

In conclusion, by adopting and applying RTWS, the World Bank would give a very clear signal that it takes basic needs, non-discrimination, priority for vulnerable and marginalised individuals and groups, and accountability seriously. It would not mean that the World Bank is obliged to implement RTWS at the country level, nor would it mean that the Bank has to guarantee that water is available for free in every country in which it works. The real benefit of RTWS is that its application would ensure that the delivery of water to all is transformed into a responsibility to be delivered by all States, which can be monitored.⁶⁷

⁶² See <http://www.worldbank.org>

⁶³ World Bank (1998): *Development and Human Rights: the role of the World Bank*. Washington: World Bank.

⁶⁴ Ibid.

⁶⁵ Ana Palacio (2008); *The Way Forward: Human Rights and the World Bank*, available at: www.worldbank.org

⁶⁶ Ibid.

⁶⁷ Roaf, V. (2006); *After Privatization, what next?*, Böll Foundation, available at: www.boell.de

BOX 3: THE RIGHT TO WATER IS ALREADY OPERATIONAL IN CENTRAL AMERICA *Jorge Mora Portuguez*

The Freshwater Action Network Central America (FANCA) was created in 2003 to promote civil society participation in the elaboration of water legislation and policies at the national, regional and international levels. FANCA promotes the recognition of access to water as a human right and the incorporation of that principle in the new water laws in all Central American countries, and in the policy instruments developed by the Central American Integration System (SICA).

At the national level the principle has already been integrated into the new Nicaraguan water law, and it is under discussion in Honduras, Costa Rica and Guatemala.

Regionally, it has also been incorporated into the Central American Integrated Water Resources Management Strategy (ECAGIRH) approved by the Councils of Ministers of Health, Agriculture and Environment of the Central American Integration System; and ratified this year by all Central American presidents. The first principle of this strategy is that access to water is a human right.

The World Bank participated in the technical group that formulated the Strategy; and the representative of the World Bank in the Regional Committee of the Americas mentioned access to water as a human right during the IV World Water Forum.

These processes all confirm that there is a very strong tendency for governments to recognize water as a human right in Central America. At the same time, thousands of local communities are organizing their own provisions of water, with more than 25,000 communities organised in Communal Water Boards, which together provide water to more than 25% of the Central American population.

At the same time hundreds of local governments in the seven countries are also providing water to communities in rural and urban areas, without any intervention from central agencies or private companies. Thus in Central America the main water providers in rural and per-urban areas are communal structures, and public agencies in the main cities.

The majority of social sectors in Central America reject the transformation of these public services into for-profit businesses incorporating private companies. There is also opposition to the development of mines, hydroelectric companies, tourism activities and agro-industries, which could come into conflict with communities because of their use of large quantities of water.

Recognising that access to water is a human right, and incorporating that principle into legislation and water policies implies support for the communal water boards, the local governments, and the national agencies in Central America, who are all already providing freshwater to the public on a not-for-profit basis. If international banks and cooperation agencies, governments, and authorities agree that the provision of freshwater is a human right and takes priority over other uses, it would be a very strong and positive signal to communities to start the process of dialogue and negotiation concerning the distribution of water between various users. ■

Summary of a presentation to Both ENDS Political Café "Testing the water: How can applying the human right to water and sanitation enhance the World Bank's policy and practice?" 9 October 2008, Washington D.C.

Jorge Mora Portuguez is an environmental lawyer and Executive Secretary of the Freshwater Action Network Central America (FANCA).

4.6

WORLD BANK POLICIES IN RELATION TO GOOD GOVERNANCE

The World Bank has promoted the need for legal and judicial reform in order to facilitate market-led development since the early 1990s, under the banner of good governance.⁶⁸ The World Bank's current Good Governance programmes attempt to build transparency and openness and combat the corruption that cripples development, economic or otherwise.⁶⁹

Most World Bank projects involve some form of legal reform. An effective and transparent judiciary system promotes development by assuring the basic security of persons and property, allowing for the peaceful resolution of disputes, facilitating economic exchange and permitting citizens to hold their government accountable.⁷⁰

The World Bank invests in judicial reform projects that seek to reassure foreign and domestic investors of the legal security of their investments,⁷¹ as well as projects that focus on ensuring property rights for the poor.⁷² Finally, World Bank policies generally try to take women and children's special rights and needs into account before and while developing projects.⁷³

Returning to the Bank's Articles of Agreement, it is prudent to recognise that respect for national sovereignty is a founding principle, and that it is committed to avoid interfering in the political affairs of member countries. By the same token, however, it also needs to be recognised that 'sovereignty' had a rather different meaning in 1944 than it does in 2008. In particular, globalisation means that national economies are significantly more integrated and interdependent now than they were then, even though they remain as distinct entities often in competition with one another.

As such, the World Bank is an increasingly important counterpart as an international institution that can influence globalization by setting out the rules of engagement. By providing financial support, attracting private investment and setting trends in the international development arena, the World Bank has a key role to play in influencing the development outcomes of various investments. Recognising key rights under international law is a crucial way of attaining the social and environmental objectives that the Bank has been striving for since 1989. ■

4.7

WORLD BANK POLICIES RELATING TO WATER AND SANITATION

When studying relevant World Bank policy documents related to the water and sanitation sector, it becomes clear that some of the necessary mechanisms for applying human rights principles are already in place, but need to be consistently and properly applied.

There is, for example, a good basis for applying RTWS in the chapter on Water Resources Management in the World Bank's Operational Manual, which states that,

"Bank involvement in water resources management entails support for providing potable water, sanitation facilities, flood control, and water for productive activities in a manner that is economically viable, environmentally sustainable, and *socially equitable*." (emphasis added)

Moreover, priority areas in which borrowers are assisted by the Bank include:

"Establishing strong legal and regulatory frameworks to ensure that social concerns are met, environmental resources are protected, and monopoly pricing is prevented."

An Annex of the Operational Manual on Involuntary Resettlement Instruments, which outlines the required elements of a resettlement plan, indicates that plans to provide infrastructure, explicitly referring to water supply, should be included. But if adequate water supply must be provided for in case of resettlement, surely it should also be guaranteed in the case of any project that may negatively impact water quality or its availability to poor people? Similarly, the Annex stipulates that resettlement projects should also address issues such as access to potable water, sanitation systems, and health facilities.

The Operational Manual also stipulates that the Bank requires an environmental assessment (EA) of projects proposed for Bank financing, to help ensure that they are environmentally sound and sustainable, and to improve decision making. An EA should take into account the natural environment (air, water and land); human health and safety; social aspects (involuntary resettlement, indigenous peoples, and physical cultural resources); and transboundary and global environmental aspects. EAs should also consider natural and social aspects in an integrated way.

Roaf (2006) argues that the World Bank needs to focus its efforts where they are most needed, with the poor. However, she also demonstrates that although there is a clear movement in this direction, the shift still needs to be consolidated in all World Bank projects, and funds dedicated to these processes need to be increased.⁷⁴ She finds evidence of projects that concentrate on community development in Bahia and Rwanda, and recommends the consistent use of tools

⁶⁸Harris, V. (2007), Consolidating Ideology in law? 25 July 2007, available at: <http://www.brettonwoodsproject.org/art-554671>.

⁶⁹World Bank (1998): Development and Human Rights: The role of the World Bank, World Bank, pp.12-15.

⁷⁰<http://www.worldbank.org/html/extdr/gc/governance/governance.htm>

⁷¹World Bank (1998): Development and Human Rights: The Role of the World Bank, p.15.

⁷²*Ibid.*, pp. 18-19.

⁷³*Ibid.*, p.22.

⁷⁴Roaf, V., After Privatization, what next?, March 2006, pp.41-42.

such as Output Based Aid and Poverty and Social Impact Analysis.

In short, some of the Bank's policies already contain guidelines dictating the development and use of socially equitable water management policies. These should be applied to other policy areas as well. ■

5

CONCLUSION AND RECOMMENDATIONS

5.1

CONCLUSION

This briefing paper shows how the right to water and sanitation can enhance the reduction of poverty through the water and sanitation sector.

Importantly, there is a global convergence on the rights-based approach to water supply and sanitation delivery from three different directions:

- There is a strong foundation for the right to water and sanitation in international law, especially since the adoption of general comment no.15 by the UN Committee on Economic, Social and Cultural Rights, in 2002.
- There has been a powerful movement towards the recognition of the right to water and sanitation at the national level, with more than 26 countries already recognising the

right to water or reforming their legal systems with this aim in mind. Many countries have also recognised the right to sanitation.

- The World Bank is increasingly embracing a rights-based approach in its development interventions, although it has yet to recognise the right to water and sanitation formally and to integrate this into its investment policies. Still, there is clear progress in the broader recognition of the rule of law, good governance, the importance of fragile States, and inclusiveness and sustainability as key principles of Bank policy.

However, while recognition of the right to water and sanitation is snowballing, it has yet to be fully integrated into the development policies of EU member states, both in terms

of bilateral policy and the contributions that they make to the World Bank. Some countries, such as the United Kingdom and the Netherlands, have gone some way to translating the right to water and sanitation into operational strategies within their development policies. For most EU countries, however, this still needs to take place.

At the level of multilateral policy, some countries have also made headway in convincing the World Bank that it should integrate human rights approaches into its development policies (as witnessed by the establishment of the Nordic Human Rights Trust Fund at the Bank, and the desire of the Dutch government to see the right to water and sanitation integrated into the World Bank's investment strategies). These initiatives still stand alone, however, and have yet to be mainstreamed into Bank policy.

In summary, the convergence of international law, some national legislation and the internal policies of the World Bank provide a powerful argument in favour of other EU member states integrating the right to water and sanitation into their development policies; and the World Bank fully and formally recognising the human right to water and sanitation. ■

5.2

RECOMMENDATIONS

With regard to EU member states:

- That those EU member states that have not already done so take steps to recognise both the right to water and the right to sanitation.
- That all EU member states take steps to fully integrate the right to water and sanitation into their development policies.
- That the development policies of EU member states recognise that a rights-based approach requires both support for legislative frameworks and the strengthening of the voice of civil society in order to realise these rights in practice.
- That EU member states encourage the World Bank and regional development banks to take the right to water and sanitation into account in their investment frameworks.

With regard to the World Bank:

- That the World Bank formally recognises the importance of the right to water supply and sanitation as a means of enhancing poverty alleviation.
- That the World Bank initiates a process whereby various aspects of its policies, including legal support, good governance, fragile states and global public goods, are reviewed with regard to their implications for its policy on the right to water and sanitation.
- That the World Bank commits itself to supporting national governments in their efforts to incorporate the right to water and sanitation into their legal frameworks.
- That the World Bank builds on recent developments in international law that serve to anchor rights to water and sanitation as universal principles that serve as a point of orientation for national governance.
- That the World Bank earmarks funds to support the process of incorporating the right to water supply and sanitation into national legislation. ■

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ANNEX 1: DEFINING TERMS

In general terms, water rights refer both to the right to abstract water (and hence use it) and the right to navigate on water. For the purposes of this document, the former connotation will suffice, i.e. the right to abstract and use water. Within this connotation, there are two key aspects that require specific attention, i.e. the right to a particular quantity of water and the right to water of a particular quality. For most uses of water, these two aspects are interrelated, as the nature of most demands for water requires both a particular quantity and a minimum quality.

Furthermore, we need to be clear about the area of application of the right to water, of which there are several. Newborne, for instance, distinguishes between a human right, a contractual right and a property right in respect of water.⁷⁵ In his scheme, the **human right** emphasises the security of access for personal and domestic uses of individuals at the 'end of the pipe'. Next, the **contractual right** emphasises continuity of supply to a (set of) premises, also at the 'end' of the pipe. Finally, **property rights** emphasise security of property and can relate to both individual and bulk contexts.

While this classification goes some way towards distinguishing between various kinds of water rights, it is neither completely accurate nor comprehensive. Hilderling⁷⁶, for her part, distinguishes between principles of international law that relate in turn to access to water, control over water and the protection of water. First, **access to water** refers to water as a **social good**, i.e. to the (human) right to water for basic human needs at the community level, the eradication of poverty at the national level, and the principle of equity at the international level. Second, **control over water** conflates Newborne's concepts of contractual rights and property rights under the heading of 'control'. These translate into a right to use water at a community level, the use of water as an **economic good** at the national level, and an open and supportive framework for the control of water at the international level. Third, **protection of water** focuses on water as an **ecological good** and highlights the sustainable management of water resources.

This classification provides a robust framework to deal with water in its various manifestations, although two categories are still missing, namely water as a **political good** and water as a cultural good. Water as a political good refers to the right of citizens to (co)determine the way in which the resource is managed and allocated at the local, catchment, river basin and national level. Water as a cultural good refers to the duty of states to protect water related cultural sites (such as the Hindu washing rites on the Ganges River in India).⁷⁷

⁷⁵Newborne, Peter (2004): Right to water: legal forms, political channels. London: Overseas Development Institute Briefing Paper

⁷⁶Hilderling, A. (2004): International Law, Sustainable Development and Water Management. Delft, the Netherlands: Eburon

⁷⁷WHO (2003): Op. Cit, p 21.

Both ENDS strives for a socially just and sustainable world. To this end we support organisations in developing countries that are active in the areas of poverty alleviation and environmental management. These local organisations have in depth knowledge of what the problems are and often come up with inspiring, sustainable solutions. We support them by providing information and mediation in funding, lobbying and networking.

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